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THE PACKERS' COMBINE FALLS UNDER THE EFFECTIVE ASSAULTS OF THE SHERMAN LAW.

The Sherman Act since its recent resuscitation in the recent case against the Northern Securities Company seems to be still continuing its victorious career and to be widely extending the sphere of its influence.

In the recent case of United States v. Swift & Co., the decision in which was handed down on January 31, 1905, the supreme court hold that traffic in live stock transported from the state or territory of its origin to another state for sale and held there for sale, is interstate commerce, and that those engaged in buying and selling such live stock are engaged in interstate commerce. This question has been before the court twice before, but was left undecided because the cases in which it was presented turned upon other considerations. The decision condemns as an unlawful restraint of trade the combination between independent dealers to suppress all competition in the purchase of live stock thus situated. It condemns as an unlawful restraint of trade, the combination between such dealers for the purpose of fixing and maintaining uniform prices in the sale of meat throughout the country. It condemns, as an unlawful restraint of trade the combination between such dealers to obtain preferential rates for the transportaion of their product by common carriers. The decision makes it clear that all combinations between independent individuals, partnerships or corporations engaged in interstate commerce by which competition between them in such commerce is suppressed, fall under the prohibition of the so-called anti-trust act. In this case the opinion of the court was a unanimous one.

The bill as originally drawn charged a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states; to bid up prices for a few days in order to induce the cattlemen to send their stock to the stock yards; to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary; to establish a uniform rule of credit to dealers and to keep a black list; to make uniform and improper charges for cartage, and, finally, to get less than lawful rates from the railroads to the exclusion of competitors.

The first defense against charges contained in the bill were that they were multifarious, and that no single act charged was unlawful. To this contention, and it is an obviously important one in litigation of this character, the court replied: "Whatever may be thought concerning the proper constitution on the statute, the bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it isto be taken to mean what it conveys to a dispassionate reader, from a fair use of English speech. Thus read this bill seems to us to be intended to allege successive elements of a single connected scheme. The scheme as a whole, seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Intent is almost essential to such a convention and is essential to such an attempt. Where intents are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."

The meat packers contended that they were not engaged in interstate commerce. This it will be observed is a more difficult point for determination and one on which the packers very fondly relied. But the court cruelly destroyed this last support by the following effective argument: "The purchasers and their slaughtering establishments are," he said, "largely in different states from those of the stock yards, and the sellers of cattle,

perhaps it is not too much to assume, largely in different states from either. The intent of the combination is not merely to restrict competition among the parties, but as we have said, by force of the general allegation, at the end of the bill, to aid in an attempt to monopolize commerce among states. When cattle are sent for sale from a place in one state with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce between the states and the purchase of the cattle is a part of and incident of such commerce. The allegations of the second section, even if they import a technical passing of title at the slaughtering places, also import that the sales are to persons in other states and that the shipments to other states are part of the transaction, "pursuant to such sales," and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some, at least, of the sales, are of the original packages. Moreover, the sales are by persons in one state to persons in another."

This decision is of great importance and fraught with wonderful consequences, as it brings within the operation of the Sherman Act, not only transportation companies which are essentially and in their very nature, interstate commerce, but all industrial enterprises which are largely interested in shipments of goods beyond the limits of the state where sold. No one hardly expected the supreme court to make such a radical extension of the domain of interstate commerce, at least not without a dissenting vote. Judge Grosscup of the United States Circuit Court, which rendered the decision, reviewed by the supreme court in this case, is reported to have given expression to the following remarkable comment on the affirmance of the decision in this case: "The substance of the case," said Judge Grosscup, "presented to the circuit court was whether the purchase of cattle from sellers living in different states, to manufacture into dressed meats, and the sale of such meats to purchasers in different states, constituted interstate commerce or not. In holding that such transactions were interstate commerce the circuit court entered on ground that from a judicial standpoint, was almost wholly new, for it was ground that had not been covered by previous decisions of the supreme court nor by the other federal courts. Naturally, the decision of the supreme court upholding the ground taken by the supreme court is personally pleasing to me. The decision establishes the right of the government to prevent combinations among the manufacturers of meats. It fortifies the Sherman act, it is a long step in the direction of effectual government supervision. But to my mind the real significance of the decision is much deeper and far-reaching than even this. It effectively clears the decks for what I believe will be the next really great national movement—as the restriction, and finally the abolition, of slavery was the last great fundamental movement—the organization and supervision, by the nation itself, of the great corporations of the future—a movement whose chief object will be not so much to control prices, or merely to curb power, as to bring corporate ownership within the reach and reasonable confidence of the people at large and thus to repeople and republicanize again the industrial ownership of the country."

NOTES OF IMPORTANT DECISIONS.

SHIPS AND SHIPPING—LIABILITY FOR DEFECTIVE WHARF.—Is a carrier by boat negligent towards its passengers in leaving unguarded a hole in the floor of its dock at a point where it is not necessary for a passenger to go to board the ship? That was the interesting question involved in the recent case of White v. Seattle Navigation Company, 78 Pac. Rep. 909. In that case the court held that a passenger who was injured by stepping into a hole in the floor of a dock while waiting for a boat was not guilty of contributory negligence because she did not remain in the waiting room until the boat arrived, nor because she deviated some thirty feet from a straight line between the waiting room and the entrance slip to the boat.

It seems that the trial court, sitting as a jury, found that there was a waiting room located upon the dock; that the plaintiff went upon the dock for the purpose of embarking upon the steamer; that it was a dark, rainy night; that instead of stopping at the waiting room, she passed between some wood racks to the southwest corner of the dock; that she did not go to that corner for the purpose of taking the said boat at that place under a misapprehension as to the place where

she would have to go to take the boat; that she knew well where the boat was to land, and where she would have to be in order to take the boat as a passenger, and that, in going around to the southwest corner of the dock, she was simply doing so for her own pastime: that in doing so she was guilty of gross negligence which greatly contributed to her injury; that defendants were not guilty of negligence. As conclusions of law the court found that judgment should be entered in favor of the defendants, and judgment was so entered. The Supreme Court of Washington in reversing the judgment of the trial court, said:

"We cannot understand upon what theory the court found that the defendants were not guilty of negligence. The law is too well settled to necessitate citing of authority that it is the duty of comon carriers, whether of steamboats or railroads. to keep in reasonably safe condition wharves, docks, or platforms upon which passengers are invited for the purpose of boarding said cars or boats. The maintaining of a dock with a hole in it the size of the hole which was conceded to be in this dock was certainly negligence, for it was a peril to any one frequenting that portion of the dock. Nor do we think that the appellant was guilty of contributory negligence in going to that portion of the dock to which she did go under the circumstances. The testimony shows that it was common for passengers waiting for the boat to frequent that part of the dock where the plaintiff was injured, and that it was frequented as much as any other part of the dock; and it is a matter of common observation and knowledge that people generally, while waiting for boats, move around more or less on different portions of the docks and platforms used by boats for taking on passengers, and do not confine themselves to any particular space directly in front of the entrance slip, or to the regulation little, stuffy, untidy, waiting rooms which generally occupy some portion of the wharf. It would be impracticable and wrong, in the face of custom and of human nature, to hold that any one who deviated from a direct line from the entrance to a dock to the entrance to a boat was guilty of contributory negligence in case of an injury; and, if the theory of the respondents here is correct, any deviation at all which was unnecessary would constitute such negligence. The boundaries of this dock were well defined by the stringers or wall upon which the appellant sat, and which she testified was about two feet high. Her deviation from the straight line between the waiting room and the entrance slip to the boat was only about thirty feet. We think she had a right to rest on the presumption that the dock was maintained in such a way that it could be traversed without imperiling life or limb."

PRESUMPTIONS AND BURDEN OF PROOF IN ACTIONS AGAINST CARRIERS FOR INJURY TO PASSENGERS AND DAMAGE TO FREIGHT.

Prefatory Remarks.—In tment of this subject, a short discussion of the doctrine of presumptions and what is meant by burden of proof will be gone into before taking them up as applied in actions against carriers. The examination of the two will be brief and necessarily incomplete.

Presumptions.—Perhaps in no branch of the law of evidence will so great confusion be found as in that relating to presumptions. This is due in a measure to the scantiness in our language of accurate, "technical terms and terminology of single and established meaning."[1] Another cause which has rendered the subject obscure is the matter of classification. Presumptions have been classified and reclassified, but "the attempted classifications are for the most part singularly ineffective."[2]

Presumption Defined.—A presumption may well be defined as a "taking-for-granted." In a general sense, a presumption is "an aid to reasoning and argumentation, which assumes the truth of certain matters for the purpose of some given inquiry."[3] In the law of evidence "a presumption is a conclusion or inference as to the truth of some fact in question, drawn from some other fact judicially noticed or proved or admitted to be true."[4]

Classification. — Presumptions have been variously classified by different writers; as, presumptions of law, of fact, conflicting, rebuttable, conclusive, irrebutable, etc. Some of these have been subdivided.

The term "conflicting presumption" should be relegated to obscurity.[5] The idea is that when the real presumption arises, the so-called presumption fades away. There can be no such thing as a conclusive presumption. The basic idea of the word "presumption" negatives such a notion. We find presump-

[1] Best, Ev. (Chamberly's Ed.) 298, note *a*.
[2] Thayer's Prel. Treat. Ev. 339.
[3] Thayer's Prel. Treat. Ev. 314.
[4] Rapalje & Lawrence's Law Dict., "Presumption."
[5] Prof. Wigmore in his edition of Greenl. Ev. (16th Ed.) section 14y suggests a way out of the difficulty by the coining of the term "successive presumptions" which is convenient and self-explanatory.

tion defined as "that which is supposed to be true on probable evidence."[6] It is difficult to understand how a fact can be established conclusively by a supposition. What is really meant when one says there is a "conclusive presumption" is that he is giving the statement of a rule of substantive law. A true presumption must necessarily be rebuttable. However, a presumption may be said to be conclusive in that it forbids the introduction of any contradictory or explanatory evidence. In this sense this sort of presumption sometimes becomes statutory law.[7] Or it may be established and declared by the courts.[8] "In the case of conclusive presumptions the rule of law merely attaches itself to the circumstances when proved; it is not deduced from them."[9] At this day courts are slow to recognize presumptions as irrebuttable. A party should not be precluded from giving in evidence by such arbitrary rules, except it be "justified by the clearest expediency and soundest policy." But the ordinary classification includes only presumptions of law and those of fact.

Presumptions of Law and of Fact Defined and Discussed.—A presumption of law is an inference or an intendment made by law or by the court, from facts appearing or proved in a particular case. A presumption of fact is an inference of an unknown fact from a known one. Both terms have been criticised and different authors have come to different conclusions. In one work,[10] the editor states that "in strictness all presumptions are in fact." A more careful and exact writer, writing some fifteen years later, arrives at the conclusion that the term "presumption of fact" is puzzling and uninstructive;[11] and and that the "distinction of presumptions of law and presumptions of fact, so far, at least, as the law of evidence is concerned, is poor and confusing."[12] Another writer[13] says the term "presumption of fact" should be discarded as useless and confusing. However, the terms are, and have been in use and despite the efforts of these writers will likely continue to be used by our courts.[14]

In a Missouri case,[15] the ordinary treatment of the subject by the courts is exemplified. In rendering the decision, Scott, J., says: "There are presumptions of law and presumptions of fact. The former are of a nature to exclude all contrary proof, and which the court will not suffer the jury to disregard; the latter are founded in experience and may be raised or not as the jury may determine, and for a disregard of which the court grants or refuses a new trial as upon evidence in all other cases of trial by jury. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by law, but should direct them that from the evidence, it is their duty to determine whether they will raise the presumption or not." Presumptions of law do not constitute a fixed body of rules, and what was an irrebuttable presumption of law in former times would not be so considered today.[16]

Effect.—Presumptions founded in common experience and not repelled by contrary evidence should be respected by juries, and the power to reject them does not reside in their will or caprice. The presumption must stand until overthrown by contrary proof.[17] It is the duty of the party against whom they work, to go forward with the evidence; and regarding them in a true sense, this is all their effect,[18] But, as has been pointed out, they are often otherwise regarded,—*e. g.*, as stating rules of substantive law, when they conclusively forbid the party going forward with proof.

Concluding Remarks.—The words of Professor Thayer[19] are exceedingly applicable in this connection: "The numberless propositions figuring in our cases under the name of presumptions are quite too heterogeneous and noncomparable in kind and quite too loosely

[6] Webster's Int. Dict., "Presumptions."

[7] For example: The statute of limitations,—Greenl. sec. 16.

[8] As in the case of title by prescription. The doctrine of estoppel is likewise ranked with this class of presumptions. Greenl. sec. 27.

[9] Greenl. (16th Ed.) sec. 32.

[10] Best, Ev. (Chamberly's Ed.) sec. 296.

[11] Thayer's Prel. Treat. 342.

[12] *Id.* 343, note 1.

[13] Prof. Wigmore in his edition of Greenl. Ev.

[14] The distinction between the two presumptions has been well pointed out in an article, "Presumptions of Law and Presumptive Evidence," published in the Eng. L. Mag. (Oct. 1831), wherein it is said: "Presumptions of law are propositions; presumptions of fact are arguments."

[15] Ham v. Barret, 28 Mo. 388.

[16] 2 Wharton, Ev. sec. 1232.

[17] Ham v. Barret, 28 Mo. 388.

[18] Thayer's Prel. Treat. Ev. 339.

[19] Thayer's Prel. Ev. 351.

conceived of and expressed, to be used or reasoned about without much circumspection. Many of them are grossly ambiguous; some are not really presumptions at all, but only wearing the name; * * * very many of them lay down a *prima facie* rule of substantive law. * * * Some are maxims, others mere inferences of reason, others rules of pleading, others variously applied. * * * Among things so incongruous as these, and so beset with ambiguity there is abundant opportunity for him to stumble and fall, who does not pick his way and walk with caution."

BURDEN OF PROOF.

Use of Term.—In considering the use of the term, the discussion will be confined to its use in civil cases; and its use in criminal cases will not be considered. The phrase "burden of proof" is an ambiguous one. It is used in two different senses: 1. The burden of establishing the case; 2. The duty of producing evidence, whether at the beginning of the cause or at any time in the progress of the trial.[20] In its true sense the burden of proof has to do with the issue. It does not in its primary sense relate to some fact which may bear upon that issue. In its secondary sense the term has to do with the going forward with the evidence; and this duty may rest either on him who asserts, or on him who denies an issue. "Many courts seem to use the term as a sort of jargon, without any definite conception of its real meaning."[21]

Does Burden of Proof Shift.—When an examination of this phase of the general subject of Burden of Proof is made, considerable confusion is found to exist in the decided cases. A distinction not always kept sight of is that between the burden of proof and the burden of evidence. In the former the burden remains throughout the trial where the pleadings place it in the first instance, while in the latter case, the burden may shift from side to side according to the state of the proof.[22] While the cases cited in the note are fair examples of the confusion existing in the minds of the judges, undoubtedly the trend is in the recognition of the unchangeable nature of the term.[23]

Upon Whom Does the Burden Rest.—The test for ascertaining upon whom the burden of proof rests has been stated as follows: "The test as to the burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular point of the case; because it is obvious that during the controversy there are points at which the burden shifts."[24] It is evident the court had in mind the second sense of the term. As we understand its meaning, the duty, in the real sense of the term, is upon the actor —"the one who holds the affirmative."[25]

Effect of Prima Facie Case.—It is sometimes said that when a person has made a *prima facie* case the burden of proof shifts. But the burden of proof, in its true sense, has not changed. What is meant is that evidence must be introduced to answer the *prima facie* case or it will prevail.[26] He who affirms must prove, and a *prima facie* case does not change the burden of proof, which remains upon the party who has the duty of establishing the issue.[27]

Effect of Presumption.—The function of a presumption is practically the same as *prima facie* proof. The presumption does not change the burden of proof in its true sense,[28] but may shift it in its second sense.[29]

Amount of Proof Required.—In civil actions the party upon whom the burden rests must, as a general proposition, produce a pre-

[20] Best, Ev. 274; Thayer's Prel. Ev. 355.

[21] 2 Thompson on Trials, 1319.

[22] Long v. Long, 44 Mo. App. 141; Marshall Livery Co. v. McKelbey, 55 Mo. App. 240; Wilder v. Cowles, 100 Mass. 487. In Missouri there is not that unanimity of opinion of the judges of the courts that is desirable. In Feurt v. Ambrose, 34 Mo. App. 366, the court says: "The burden of proof never shifts under any circumstances whatever." This is criticised in Bunker v. Hibler, 49 Mo. App. 543, *l. c.*, as being "too strong an expression." In McCartney v. Insurance Co., 45 Mo. App. 379, *l. c.*, Smith, J., says: "It is a well settled rule of practice that burden of proof, which means the burden of establishing a case, remains unchangeable throughout the entire case exactly where the pleadings originally placed it, though the burden of evidence may, during the trial, be shifted from scale to scale." But in Kanoche v. Whiteman, 86 Mo. App. 571, *l. c.*, we find Judge Ellison saying: "It is not true the burden of proof never changes."

[23] Ency. of Ev. Vol. II., 78; Thayer's Prel. Treat. Ev. 351; Chap. on "Burden of Proof;" Greenl. Ev. (16th Ed.) 105; Scott v. Wood, 81 Cal. 398.

[24] Bowen, L. J., in Abrath v. Ry. Co., 11 Q. B. D. 440.

[25] Thayer's Prel. Treat. Ev. 370.

[26] Heineman v. Heard, 62 N. Y. 448, 5 Am. & Eng. Enc. of Law, 31, note 1.

[27] Blanchard v. Young, 11 Cush. 341.

[28] Baxter v. Abbott, 7 Gray, *l. c.* 83.

[29] Abrath v. N. W. Ry. Co., 11 Q. B. D. 440; Mullen v. St. John, 57 N. Y. 567, Am. Rep. 530.

ponderance of evidence, but this proof need not be such as is sufficient to satisfy the jury. The jury in a civil case is to decide upon the preponderance of evidence, even though the proof does not show the facts to the satisfaction of its members.[30]

When Less Proof is Required.—Less proof may be required where the facts are peculiarly within the adversary's knowledge.[31]

CARRIERS OF FREIGHT.

Preliminary Remarks.—In the treatment of this subject the inquiry will be limited to the so-called "common carriers."

Common Carrier Defined.—"A common carrier (of freight) is one who undertakes for hire to transport the goods of such as choose to employ him from place to place."[32]

Who Are Common Carriers. — Omnibus men,[33] truckmen and owners of wagons,[34] street car companies,[35] express companies,[36] fast freight lines and dispatch companies,[37] transfer companies,[38] railroad companies,[39] steamship companies.[40] Other public agencies are gradually assuming the position of common carriers.

Who Is Common Carrier—Test.—The test, as to whether one is a common carrier or not, is "whether he holds out either expressly or by a course of conduct that he will carry for hire so long as he has room, the goods of all persons indifferently who send him goods to be carried."[41]

Carrier's Liability.—At common law the carrier was an insurer against loss or injury to the property, except in two cases: where the loss or injury occurred by act of God or of the public enemy.[42] To these have been added the following: where the loss or injury is caused by the inherent nature of the goods;[43] where the loss or injury is the result of the act of the shipper;[44] when caused by public authority;[45] and there is a modification of liability when the freight is live stock.[46]

Fixing Carrier's Liability.—The primary essential in fixing the carrier's liability is the delivery or tender of the property to him.[47]

Action Against Carrier.—The plaintiff may bring his action either *ex delicto* or *ex contractu* —*ex delicto* for breach of duty to carry and safely deliver, and *ex contractu* on the contract, which contract may be special.[48]

Who Is Injured Party in Case of Loss or Damage.—There is a legal presumption that the consignee is the owner of the goods, and as such is entitled to damages for their loss or injury.[49] The carrier in absence of knowledge to the contrary, has a right to settle with the consignee.[50]

The Proofs.—In general, the plaintiff's case as he alleges it, must be substantiated. Such elements as are required to be stated in the plaintiff's petition must be proven by the plaintiff. He must allege and prove a delivery of the goods, in good order, to the carrier, an undertaking on the carrier's part to carry, a failure to perform by the carrier and the loss or injury.

Negligence—Who Has the Burden of Proof. —It is upon the answer to the question, "Upon whom is the burden of proof, with respect to negligence?" that great variation of opinion exists in different courts. A writer on this subject declares that great confusion exists on the question, and that "the decisions in some states on this question contradict each other in such a manner that the same court occupies the spectacle of swinging back and forth like the oscillations of a pendulum."[51] Negligence, being a wrong, should not be presumed. As the plaintiff alleges the goods were lost or injured by negligence on the part of the carrier, it seems he should

[30] Stratton v. Ry. Co., 95 Ill. 25. This rule is denied in the courts of some states,—Mays v. Williams, 27 Ala. 267.

[31] Dederich v. McAlister, 49 How. Pr. (N. Y.) 351; Wheat v. State, 6 Mo. 455.

[32] Parker, C. J., in Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133.

[33] Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

[34] Verner v. Switzler, 32 Pa. St. 208.

[35] Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587.

[36] Buckland v. Ex. Co., 97 Mass. 124, 93 Am. Dec. 68.

[37] Van Zile's Bailments & Carriers, sec. 422.

[38] Richards v. Westcott, 2 Bosw. 589.

[39] Norway Plains Co. v. Ry. Co., 1 Gray, 263.

[40] Liverpool Steamboat Co. v. Phoenix Co., 129 U. S. 397.

[41] Lawson on Bailments & Carriers, sec. 83; Allen v. Sackrider, 37 N. Y. 341.

[42] Coggs v. Bernard 2 Lord Raymond, 909.

[43] Hastings v. Pepper, 11 Pick. 41.

[44] Newby v. Ry. Co., 19 Mo. App. 391.

[45] Evans v. Ry. Co., 111 Mass. 142.

[46] Cooper v. Ry. Co., 110 Ga. 659.

[47] St. L. Ry. Co. v. I. N. S. Co., 139 U. S. 223.

[48] Oxley v. Ry. Co., 65 Mo. 630.

[49] Scammon v. Ex. Co., 84 Cal. 311.

[50] Dyer v. Ry. Co., 51 Minn. 345, 53 N. W. Rep. 714.

[51] Seymour D. Thompson, 22 Am. L. Rev. 199. In this list he places the courts of New York, Pennsylvania and Missouri.

have the burden of establishing this allegation. Logically he must have this burden for the affirmative is on him. This is the use of the term, "burden of proof," in the sense that it does not shift,[52] so that when it is said, "that a *prima facie* case of negligence is made out against the carrier by showing the goods were delivered to him, and that he has either not redelivered them or has redelivered them in a damaged condition,"[53] it should not be meant that the burden of establishing negligence has been shifted. What is meant is, that if no further evidence is introduced, the plaintiff will be entitled to a verdict, but when the defendant has met this *prima facie* case, he has done all that is required of him and the burden of establishing his negligence is where it has always been,—on the one affirming it,—that is, upon the plaintiff. Some courts go off on a tangent in this class of cases on the question of how the shipper is to prove negligence instead of confining themselves to the sole question before them. A good example is the case from which the quotation has just been made. But the courts are not unanimous on this, and some courts hold flatly, that even if the acceptance of goods was special, the burden of proof is on the carrier, not only to show that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care. He must establish this. This rule is supported by the argument that the facts are peculiarly within the knowledge of the carrier, while it is practically impossible for the shipper to show how the injury occurred (if this be argument).[54]

Special Contract.—The burden of proof is on the carrier to show a special contract, and that the loss was within the exemption clause.[55]

Presumptions.—Rules of presumption play an important part in the matter of the making of a *prima facie* case, and presumptions are asserted to exist in cases where one would hardly look for them; for example, in this matter of negligence. In a Texas case,[56] after stating the elements necessary to make out a *prima facie* case,—delivery in good order to carrier and their non-delivery by carrier, or redelivery in damaged condition,—Willie, C. J., says: "It is safest to presume the carrier is negligent, who refuses to show to the contrary, when if such is the fact, he has but to call his own agents, under whose charge the goods have continually been. * * * Specific acts of negligence can scarcely ever be shown by the owner; it must, therefore, be presumed from injuries which ordinarily result only from negligence." Judge Willie admits that the majority of the English and American decisions and texts are against his view.

While negligence is a wrong, and its existence must be affirmatively alleged, and every person is presumed to do his duty until the contrary is shown, and for these reasons it should not be presumed, there is nevertheless some merit to the contention (which insists) that a presumption of negligence should be raised against the carrier in case of loss of or injury to the goods. The owner seldom accompanies the goods, has no means of knowing how or where the injury occurred, must rely on the very ones who would be interested in concealing the truth. Truly, from a public policy view there is merit in these contentions, but

[52] Lamb v. Ry. Co., 46 N. Y. 271, 7 Am. Rep. 327; Clark v. Barnwell, 12 How. 272; Western Transp. Co. v. Downer, 11 Wall. 129; Colton v. Ry. Co., 67 Pa. 211, 5 Am. Rep. 424; Ohrloff v. Briscoll, L. R. 1 P. C. App. 231; Bankard v. Ry. Co., 34 Md. 197, 6 Am. Rep. 321; George v. Ry. Co., 57 Mo. App. 358; Indianapolis, etc., Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. Rep. 1138; Little Rock, etc., Ry. Co. v. Talbot, 39 Ark. 523; Smith v. Ry. Co., 64 N. Car. 235; Kelham v. Kensington, 24 La. Ann. 100; Mitchell v. Ex. Co., 46 Iowa, 214; Witting v. Ry. Co., 101 Mo. 631, 14 S. W. Rep. 743.

[53] Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

[54] 2 Greenl. Ev. sec. 219; Gray v. Mobile Trade Co., 55 Ala. 397, 28 Am. Rep. 729; Louisville, etc., Ry. Co. v. Cowherd, 120 Ala. 51, 28 So. Rep. 793; Berry v. Cooper, 28 Ga. 543; Adams Ex. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Shriver v. Ry. Co., 24 Minn. 506, 31 Am. Rep. 355; Hinton v. Ry. Co., 72 Minn. 339, 75 N. W. Rep. 373; So. Ex. Co. v. Seide, 67 Miss. 609, 7 So. Rep. 547; Cox v. Ry. Co., 170 Mass. 136, 49 N. E. Rep. 97; Levering v. Union Trans. Co., 42 Mo. 89; Ketchum v. Ex. Co., 52 Mo. 390,—both overruled in Read v. Ry. Co., 60 Mo. 199, which case was affirmed in Witting v. Ry. Co., 101 Mo. 631, 14 S. W. Rep. 743; United States Ex. Co. v. Backman, 28 Ohio St. 156; Whitesides v. Russell, 8 Watts & S. (Pa.) 49; Baker v. Brinson, 9 Rich. (S. Car.) 201, 67 Am. Dec. 549; Houston, etc., Ry. Co. v. McFadden, 91 Tex. 194, 40 S. W. Rep. 217, 42 S. W. Rep. 593; Brown v. Ex. Co., 15 W. Va. 812.

[55] Western Trans. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Louis v. Smith, 107 Mass. 334; Southhard v. Ry. Co., 60 Minn. 382, 62 N. W. Rep. 442; Nave v. Ex. Co., 19 Mo. App. 563; Schaeffer v. Ry. Co., 168 Pa. St. 209, 31 Atl. Rep. 1088; Browning v. Goodrich Trans. Co., 78 Wis. 391, 47 N. W. Rep. 428.

[56] Ryan v. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589.

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do they establish the argument in favor of raising a presumption? If the carrier sets up a special contract limiting his liability a consideration will be presumed and none need be proved.[57] A presumption of the carrier's liability arises on the plaintiff showing delivery to the carrier and non-delivery by the latter.[58]

But there is no presumption that delivery was made to the carrier.[59] Nor is there any presumption the goods were in good order when delivered,[60] but if it is shown they were in good order when delivered and were damaged when redelivered, there is a presumption they were injured while in the carrier's possession,[61] and if they are damaged while in possession of the carrier there is a *prima facie* presumption that the injury was occasioned by carrier's default.[62] The common law strongly presumes against every public transporter to whom, in the regular course of business, property has been consigned for carriage, which fails in due time to reach its destination reasonably safe and sound.[63] In the case of bailments generally the authorities hold that in the event of loss or injury there is a presumption against the bailee who has the custody of the goods.[64] The liability of a common carrier having one attached is presumed to continue, and if he claims his liability as that of a warehouseman he must prove it.[65]

[57] York Co. v. Ry. Co., 3 Wall. 107.

[58] George v. Ry. Co., 57 Mo. App. 358. According to one authority, Am. & Eng. Enc. Law, vol. 5 (2d Ed.), 355, this is the doctrine in the courts of England, Canada, United States, and of the states of Alabama, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin.

[59] Louisville, etc., Ry. Co. v. Echols, 97 Ala. 556.

[60] Smith v. Ry. Co., 43 Barb. (N. Y.) 225.

[61] Nave v. Ex. Co., 19 Mo. App. 563.

[62] Ceballos v. Warren Adams, 74 Fed. Rep. 126; So. Ex. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Lewis v. Smith, 107 Mass. 334; Southhard v. Ry. Co., 60 Minn. 382, 62 N. W. Rep. 442; Nave v. Ex. Co., 19 Mo. App. 563.

[63] Schouler's Bailments, 417; Hill v. Sturgeon, 28 Mo. 323.

[64] Lichterhein v. Ry. Co., 11 Cush. 70; Woodruff v. Painter, 150 Pa. 91, 24 Atl. Rep. 621; Funkhouser v. Wagner, 62 Ill. 59; Prince v. Ala. State Fair, 106 Ala. 340, 28 L. R. A. 716, 17 So. Rep. 449; Goodfellow v. Meegan, 32 Mo. 280.

[65] Peoria, etc., Ry. Co. v. United States Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348.

The fact that a restrictive notice is shown to have been actually seen by the owner will not raise a presumption of his assent to its terms. The presumption would be rather that he intends to insist on his rights.[66]

Carriers of Live Stock—What Term Embraces.—The term embraces all carriers who undertake for hire to transport such stock for all who demand such service.[67] They are common carriers.[68]

Burden of Proof.—Carriers of live stock are not insurers.[69] The transportation of live stock forms an exception to the general rule (as to liability of carriers) only so far as the burden of proof is concerned. Mere receipt of "dead freight" in good order and delivery by carrier in damaged condition makes out a *prima facie* case. But when the freight is live stock the shipper must show these things and must go further and show the injury was caused or concurred in by human agency,[70] so that the burden of proof is on the shipper to show negligence.[71] If the shipper claims certain stipulations in his contract are unreasonable the burden of showing the unreasonableness is on him.[72]

Connecting Carrier — Term Defined—His Duties.—A connecting carrier is a carrier between the initial carrier's line and the destination of the goods.[73] In general the duties resting upon him are the same as those involving on initial carriers.

Against Whom Shall Owner Bring Action for Loss or Damage?—There appear to be three distinct rulings: 1. That where goods have been injured the owner may bring his action against the initial carrier and hold him liable for loss or injury. In the absence of an ex-

[66] McMillen v. Ry. Co., 16 Mich. 79, 110, 93 Am. Dec. 208.

[67] 5 Am. & Eng. Enc. Law, 428.

[68] Leonard v. Ry. Co., 54 Mo. App. 293. Except in Michigan where they have held private carriers, and as such liable only for ordinary diligence. Heller v. Ry. Co., 109 Mich. 53.

[69] Cash v. Ry. Co., 81 Mo. App. 109.

[70] Hance v. Ex. Co., 48 Mo. App. 179.

[71] Hussey v. Saragussa, 3 Woods (Fed.), 380; Western Ry. Co. v. Harwell, 91 Ala. 340, 8 So. Rep. 649; Clark v. Ry. Co., 64 Mo. 440; Giblan v. Nat. S. S. Co., 28 N. Y. Supp. 69. *Contra:* Ohio, etc., Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. Rep. 168; Daw v. Portland Steam Packet Co., 84 Me. 490, 24 Atl. Rep. 945.

[72] 5 Am. & Eng. Enc. Law, 456. A contrary rule obtains in Texas Mo. Pac. Ry. Co. v. Fagan, 72 Tex. [illegible], 13 Am. St. Rep. 776.

[73] Mansen v. Jacobs, 12 Mo. App. 125, 93 Mo. 331.

press contract English courts maintain there is a presumption that the first carrier is liable, holding that the acceptance of goods and shipment of them without positively limiting his liability by contract, was *prima facie* an undertaking to carry them to their destination. 2. A second class of authorities holds that the last carrier is liable and that the action may be brought against him; this being upon the presumption that the goods must have been received in good order when they came to the line of the last carrier [74] and the burden is on the defendant to explain the loss or injury.[75] 3. A third class of decisions holds that there is no presumption as to where the goods were injured or lost, but that it is the subject of proof and that the plaintiff must show which of the carriers was liable for the injury.[76]

Effect of Acceptance of Goods Marked to Destination Beyond Carrier's Line—English Rule.—The English rule is that the carrier receiving goods so marked becomes liable as carrier for the entire transportation.[77] Under this rule an acceptance by the carrier of goods so marked creates a *prima facie* liability to transport the goods to that point and there deliver. The burden is on the carrier to show there was some known usage or contract governing the matter.[78]

Same—American Rule.—By this rule the liability of the first carrier ceases when he has transported goods to the end of his own line and delivered them to connecting carrier.[79]

Carriers of Passengers—Common Carrier of Passengers Defined.—A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage.[80]

Relation Between Carrie and Passenger.—The relation which a ca bears to a passenger is essentially different from that he bears to inanimate freight. When he receives the latter he stores it where he pleases and there it remains until removed. A passenger possessing judgment and intelligence must use these, and appreciating the worth of care, he must use ordinary care in shunning danger. So, there are not the same reasons for, nor does public policy require, the same degree of care in the two cases. While a carrier is an insurer, subject to recognized exceptions, of goods which he carries, he is not such of passengers. "He is held to that high degree of dilligence which the particular business surrounded by its dangers and demands for skill and care requires."[81]

Who are Passengers?—A satisfactory definition would be difficult to frame. The term conveys an idea of a status rather than a conception of a person. It is defined as follows: "A passenger is one who is entitled to travel in some public conveyance otherwise than in the service of the carrier by virtue of a contract express or implied with the carrier, and one who is within the carrier's charge under such contract.[82] This is as good a definition as could be framed. But it is better to consider the question from the view point of relationship and that must be determined from each case.[83]

Relationship Begins When? — In determining at what time the relation of carrier and passenger comes into existence, the question of intention is important, for by ascertaining it one is enabled to say whether a person is a passenger or a licensee. One

[74] Shriver v. Ry. Co., 24 Minn. 506, 34 Am. Rep. 353; Smith v. Ry. Co., 43 Barb. 225; Flynn v. Ry. Co., 43 Mo. App. 424.

[75] So. Ex. Co. v. Hess, 53 Ala. 19; Faison v. Ry. Co. 69 Miss. 569, 15 So. Rep. 37; Louisville, etc., Ry. Co v. Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. Rep. 392.

[76] M. H. & O. Co. v. Kirkwood, 45 Mich. 51; Farmington Co. v. Ry. Co., 166 Mass. 154, 44 N. E. Rep. 131; Chicago, etc., Ry. Co. v. Goldman, 46 Ill. App. 625.

[77] Muschamps v. Ry. Co., 8 M. & W. 421.

[78] Mobile, etc., Ry. Co. v. Copeland, 63 Ala. 219, 35 Am. Rep. 13; Wabash Ry. Co. v. Jaggerman, 115 Ill. 407. This rule has been adopted in Missouri by statute, Sec. 5222, R. S. 1899.

[79] Grover v. Ry. Co., 70 Mo. 672; Hempstead v. Ry. Co., 28 Barb. (N. Y.) 485; Washburn Mfg. Co. v. Ry. Co., 113 Mass. 490; St. L. Insurance Co. v. Ry. Co., 104 U. S. 146.

[80] Lawson's Bailments, Sec. 217. This group includes a large number of present day transportation activities, railroad companies, owners of steamboats, omnibuses, street cars and stage coaches.

[81] Lawson's Bailments, Sec. 231; Van Zile's Bailments, Sec. 593.

[82] Lawson's Bailments, Sec. 225.

[83] Carrier may owe a duty to others than passengers, express messengers. Brewer v. Ry. Co., 124 N. Y. 59, 11 L. R. A. 483; mail agents, Cleveland, etc., Ry. Co. v. Ketcham, 133 Ind. 346, 19 L. R. A. 339; drovers riding on passes issued by company on account of shipment of stock, Cleveland, etc., Ry. Co. v. Kurren, 19 Ohio St. 1; workman and employees—depending on circumstances—Texas, etc., Ry. v. Smith, 67 Fed. Rep. 524, 30 L. R. A. 321.

becomes a passenger from the time he places himself in the carrier's charge with the intention of taking passage.

Relation Ends When?—The relation thus formed continued with the passenger during transit. If he has boarded the vehicle furnished by the carrier for passengers, the law will presume he is a passenger and the burden of proof in case of dispute is upon the carrier to show he was not such.[84] Without going further into the question, the relation may be said to be terminated when the passenger has arrived at his destination and has had a reasonable time in which to leave the carrier's premises.[85]

Whom Must Carrier Accept?—The general doctrine is that "it is his duty to receive all passengers who offer, to carry them the whole route, to demand no more than usual and established compensation."[86]

Carrier's Undertaking.—A carrier of passengers is not an insurer, his undertaking being to carry the passenger without fault or negligence.[87]

Negligence.—Negligence as a rule must be proved by him who alleges, but the rule does not universally hold, for we find in the case of carriers of passengers that through the agency of presumption, it is often incumbent on the defendant to prove its absence.

The Evidence—The Burden of Proof.—The burden of proof is on the passenger to show, first, a breach of duty which the carrier owes him; second, the damage resulting from this breach.[88] It would seem the burden of establishing negligence should be on the plaintiff [89] and perhaps if the evidence disclosed an isolated, colorless fact the presumption of negligence on the part of the carrier would not arise.[90] But such a case seldom appears, so the rule is laid down as follows: "If a passenger be injured while the relation of carrier and passenger exist the burden is upon it to show the injury was not occasioned by its negligence."[91] Some states have enacted this rule into their statutory law.[92] The burden of showing the extent of his injury caused by defendant's breach of duty, is upon the plaintiff.[93] The party having the burden of proof makes out his case by presenting a preponderence of evidence.[94]

Same—Contributory Negligence.—It seems that as contributory negligence is considered a defense, the plaintiff should not be called upon to allege that he was free therefrom, but that the defendant should show that such existed.[95] This question of contributory negligence has an important bearing on that of upon whom is the burden of proof. If the plaintiff must, in order to make out his *prima facie* case, allege he was free from contributory negligence, he must prove his allegation and therefore, the burden of making out the proof of his non-contributing to his injury rests upon him. On the other hand, if it is a matter of defense and the plaintiff need not allege it, then the burden of proof is on the defendant to show that the injury would not have resulted but for the negligence of plaintiff, contributing to his injury. But in many of the cases in which contributory negligence is supposed to exist it is not really present. The real question in such cases is, was the injured party acting within his rights. If so, although the injury occurred as a result, there is no contributory negligence.

Presumption of Being Passenger.—If a person is on a carrier's customary vehicle, he is presumed to be there as a passenger, and the burden is on the carrier to show the contrary,[96] but if he is ejected, the burden of

[84] Iseman v. S. C. etc., Co., 52 S. C. 566.

[85] Dodge v. Boston, etc., S. S. Co., 148 Mass. 207, 19 N. E. Rep. 273.

[86] 2 Parson's Contracts, 225.

[87] Leslie v. Ry. Co., 88 Mo. 50.

[88] Fetter on Carriers of Passengers, Sec. 473.

[89] Hayes v. Ry. Co., 97 N. Y. 259.

[90] For example, see case of Wiedman v. N. Y. Elev R. Co., 114 N. Y. 462.

[91] Seveney v. Ry. Co., 150 Mo. 385, 51 S. W. Rep. 682

[92] Sec. 3033 Code of Georgia 1882; Laws of Florida 1890-91, ch. 4071, Sec. 1.

[93] Louisville, etc., Ry. Co. v. Minogue, 90 Ky. 369, 14 S. W. Rep. 357.

[94] Seybolt v. Ry. Co., 95 N. Y. 562.

[95] According to Van Zile, Sec. 722, Bailments and Carriers, this rule obtains in England and in 23 of the states of this country. He gives the following list of states: Alabama, California, Georgia, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, New York, Ohio, Oregon, South Carolina, Texas, Virginia, Washington, West Virginia, Wisconsin. Those states which hold the plaintiff must aver that he was free from contributory negligence or that the injury occurred without some fault on his part he names: Indiana, Maryland, Maine, Massachusetts, Michigan, Rhode Island, Illinois, Iowa. To this list should be added Connecticut, Fox v. Glastenbury, 29 Conn. 204; Louisiana, Moore v. Shreveport, 3 La. Ann 645; Mississippi, Vicksburg v. Hennessy, 34 Miss. 391.

[96] Iseman v. S. Car., etc., Co., 52 S. Car. 566.

proof is on him to show that he was rightly on the vehicle.[97]

Presumption of Negligence. — Courts, on the ground of public policy, have departed from the rule, "that negligence should not be presumed to exist," when the relation between the parties has been shown to have been that of carrier and passenger. We find the doctrine, as followed by many courts, clearly stated in a Minnesota case[98] "where an injury occurs to a passenger through a defect in the construction or working, or management of vehicles or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident.[99] From a view of these cases, it seems that this presumption arises only in such cases where the defendant has exclusive control and management, or where the passenger is injured, without fault on his part, by reason of defective machinery, appliances, or the roadway giving away. In all cases the mere fact that the passenger was injured does not bring a presumption of negligence into existence. There must be evidence tending to connect the carrier, in some of the above ways with the happening of the injury.[100]

Examples Where This Presumption Has Arisen.—Numerous instances in which this presumption of negligence was held to exist might be cited. A few will be given: Where a stage coach was overturned by the coming off of a wheel,[101] where the train in which passenger was riding was derailed;[102] so, a collision at an intersecting crossing raises a presumption of negligence against the carrier;[103] again, the washing away of a railroad embankment causing a disaster to a passenger train;[104] so, where injury is caused by sudden stopping of train;[105] so, where passenger s injured by slamming of car door;[106] but a mere showing that the person was injured while attempting to get on or off the carrier's vehicle does not raise a presumption of negligence;[107] but where a ventilating window, while being opened by a porter, falls upon a passenger the presumption was held to exist.[108]

Same—Persons Not Passengers.—In order that this presumption of negligence may obtain the person injured must be a passenger. The presumption does not arise when the person injured is a trespasser, nor when he is escorting a passenger on a train.[109]

Effect of Presmption.—This depends upon the manner in which the subject of the burden of proof is treated. In some cases the presumption is said to "shift" the burden of proof;[110] in other courts, the logical treatment of the burden of proof places it on the affirmative and there it remains and the presumption does not "shift" it in its true sense.[111]

Statutory Presumptions. — Mississippi, Georgia and Florida have statutory provisions which in effect declare that if property is damaged or a passenger is injured, a presumption of negligence arises.[112]

A Missouri Conflict.—In one case,[113] which was an action for damages against a carrier for injuries to a passenger, Gantt, P. J., says with respect to the burden of proof: "When a passenger suffers injury by the breaking down or overturning of a coach, the *prima facie* presumption is that it was occasioned by some negligence of the carrier and the burden is cast upon the carrier to rebut and establish there was no negligence and that the injury was occasioned by inevi-

[97] Ga. Cen. Ry. Co. v. Cannon, 106 Ga. 828, 32 S. E. Rep. 874.

[98] Smith v. Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. Rep. 827.

[99] Curtis v. Ry. Co., 18 N. Y. 534, 75 Am. Dec. 258; Dougherty v. Ry. Co., 9 Mo. App. 484, 51 Am. Rep. 237; Birmingham, etc., Ry. Co. v. Hale, 90 Ala. 8, 8 So. Rep. 142; Boyce v. California Stage Coach Co., 25 Cal. 460; Springer v. Schultz, 205 Ill. 144, 68 N. E. Rep. 753; Anderson v. Scholey, 114 Ind. 553; Louisville, etc., Ry. Co. v. Reynolds, 24 Ky. L. Rep. 1402; Leveret v. Ry. Co., 34 So. Rep. (La. 1903); Western Maryland Ry. Co. v. State, 95 Md. 637, 53 Atl. Rep. 969; Chicago, etc., Ry. Co. v. Winfrey, 93 N. W. Rep. 526 (Nebraska 1903); *contra*: Griffin v. Manice, 174 N. Y. 505, 66 N. E. Rep. 1109; Murray v. Ry. Co., 25 R. I. 209, 55 Atl. Rep. 491.

[100] Pa. Ry. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. Rep. 14; Jacquin v. Cable Co., 57 Mo. App. 320.

[101] Ware v. Gay, 11 Pick. (Mass.) 106.

[102] Hipsley v. Ry. Co., 88 Mo. 348.

[103] Clark v. Ry. Co., 127 Mo. 197, 29 S. W. Rep. 1013.

[104] Philadelphia, etc., Ry. Co. v. Anderson, 94 Pa. St. 351.

[105] Coudy v. Ry. Co., 85 Mo. 79.

[106] Madden v. Ry. Co., 50 Mo. App. 656.

[107] Olferman v. Ry. Co., 125 Mo. 408, 28 S. W. Rep. 742.

[108] Och v. Ry. Co., 130 Mo. 27, 31 S. W. Rep. 962.

[109] Yornell v. Ry. Co., 113 Mo. 570, 21 S. W. Rep. 1.

[110] Montgomery, etc., Ry. Co. v. Mallette, 92 Ala. 209, 9 So. Rep. 263.

[111] Schaefer v. Ry. Co., 128 Mo. 64.

[112] Fetter, Carriers of Passengers, Sec. 496.

[113] Clark v. Ry. Co., 127 Mo. 197.

table accident or some cause which human precaution and foresight could not have averted."[114] This case was decided March 5, 1895, by Division No. 2, of Supreme Court of Missouri. In another case[115] the court through Robinson, J., says: "Strictly speaking the burden of proof of care is never at any stage of the proceeding thrown upon the defendant. The burden at all times rests on the plaintiffs to prove the allegations of his petition." Since the decision of these two cases this question has not come squarely before the court. The doctrine laid down in the Schaefer case is undoubtedly logically correct, and is in accordance with the best thought of the present time. If the Clark case is followed, the court will likely leave the question of presumption out of view and place its decision on the ground of public policy.

Baggage—Carrier's Liability For. — The carrier's liability for baggage exclusively under his control is that of a carrier of goods.[116] It would seem that the same rules as to presumptions and burden of proof should govern as in the case of the carrier of goods.

Passenger Elevators.—There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad.[117] The same rules of presumption and burden of proof should therefore govern as in the case of carriers of passengers.

R. O. SUMMERVILLE.

Chillicothe, Mo.

[114] Lemon v. Chanselor, 68 Mo. 340; Furnish v. Ry. Co., 102 Mo. 438, 13 S. W. Rep. 1044.
[115] Schaefer v. Ry. Co., 128 Mo. 71 and 72.
[116] Seasongood v. Ry. Co., 14 Ky. L. R. 430.
[117] Becker v. Lincoln Real Estate & Building Co. 174 Mo. 246, 73 S. W Rep. 581.

POLICE OFFICER—FAILURE TO SUPPRESS CRIME IN DISTRICT.

STATE v. BOYD.

St. Louis Court of Appeals, Missouri, April 12, 1904. On Rehearing, December 13, 1904.

An indictment charging a police captain with omitting to prevent the maintaining of bawdyhouses in his district, with the omission to arrest certain designated keepers of different bawdyhouses, and with the omission to arrest the inmates and habitues of the houses as vagrants, was not bad for duplicity, but charged but one offense, the gravamen of which was that defendant unlawfully permitted houses of ill fame to be set up and maintained within his district, and the allegations of failure to arrest the offenders named were merely amplifications of the offense charged.

Under Rev. St. 1899, § 2197, making the setting up of a bawdyhouse a misdemeanor; section 6232, declaring police officers of the city of St. Louis state and city officers; and section 6212, making it their duty to prevent crime and arrest the offenders—it is the duty of a captain of police of the city of St. Louis, for the omission to perform which he is punishable by indictment, to suppress bawdyhouses which he knows have been set up and are being maintained in his district.

Reyburn, J., dissenting.

BLAND, P. J.: Omitting caption, the indictment is as follows: "The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court duly impaneled, sworn and charged, upon their oath present that at the city of St. Louis aforesaid, and on the fifteenth day of February in the year one thousand and nine hundred and three (and for a long time prior thereto), one Samuel J. Boyd was a public officer and a person holding a trust and appointment, within and for the city of St. Louis and the state of Missouri, to-wit, a member of the metropolitan police force and department of the said city of St. Louis, of the grade and designation of captain of police, duly appointed, enrolled and employed by the board of police commissioners of said city, assigned and detailed to, and the principal officer of police and in command of, that portion of territory of said city known and designated, for the purpose of police government, and duly established by the board of police commissioners of said city, as the Fourth Police District of said city, and that the said Samuel J. Boyd was then and there (and for a long time had been), by virtue of the laws of the state of Missouri, a state officer. That he, the said Samuel J. Boyd, was then and there (and for a long time prior thereto had been) duly appointed and designated as such captain of police by the said board of police commissioners of said city, under and by virtue of the laws of the state of Missouri, and was then and there (and for a long time prior thereto had been) duly commissioned, sworn, assigned and acting as such captain of police, and in command, control, supervision and direction, for the purpose of police government, and to enable the said board of police commissioners to perform the duties imposed upon them by law, of the said Fourth Police District of said city. That under and by virtue of the laws of the state of Missouri it was the official duty of the said board of police commissioners of said city, and of every member of the said police force and department of said city appointed, enrolled and employed as such by the said board of police commissioners, and the official duty of him, the said Samuel J. Boyd, as such member of said police force and department, and as such captain of police, and as such public officer, and as such state officer, at all times of the day and night, within the boundaries of said city, to pre-

serve the public peace, to prevent crime and arrest offenders, to prevent and remove nuisances on all streets and highways and other places, and to see that all laws of the state of Missouri relating to vagrants and disorderly persons were enforced. That he, the said Samuel J. Boyd, as such captain of police, then and there (and for a long time prior thereto) had under his command and subject to his orders numerous sergeants and patrolmen of police, members of the said police force and department, and was vested with adequate power and authority, as such captain of police in command of said Fourth Police District, and as such public and state officer, for the proper and efficient performance of the duty aforesaid. That at the said city of St. Louis, and on the said fifteenth day of February, in the year one thousand nine hundred and three (and for a long time prior thereto), and within the territory so known and designated as the said Fourth Police District of said city, so commanded by him, the said Samuel J. Boyd, as captain of police as aforesaid, there were, and had been for a long time, continuously, open and notoriously set up, kept and maintained certain common bawdyhouses and brothels and that then and there, and for a long time prior thereto, unlawful and disorderly conduct and practices were committed in each and all of said houses, and divers common prostitutes and bawds, vagrants and disorderly persons resorted to and resided in said houses for the purposes of common prostitution and bawdry, and solicited men for the purpose of sexual intercourse therefrom and in front thereof, which said common bawdyhouses and brothels were so set up, kept and maintained in said Fourth Police District in certain buildings situated upon certain streets and highways of said city, known and designated as North Twelfth street, North High street, Linden street and Gay street, which said buildings were known and designated respectively by the following street numbers, to-wit: The building designated as number 703 North Twelfth street, the building designated as number 705 North Twelfth street, the building designated as number 707 North Twelfth street, the building designated as number 709 North Twelfth street, the building designated as number 711 North Twelfth street, the building designated as number 713 North Twelfth street, the building designated as number 721 North Twelfth street, the building designated as number 726 North Twelfth street, the building designated as number 821 North Twelfth street, the building designated as number 1205 Linden, the buildings designated as numbers 1208 and 1210 Linden street, the building designated asnumber 1215 Linden street, the building designated as number 1235 Linden street, the building designated as number 721 North High street—wherein the said common bawdyhouses and brothels were then and there (and for a long time had been) so continuously, openly and notoriously set up, kept and maintained respectively by Fannie Adams, Rose Brown, Birdie Hill (*alias* Hall), Becky Weinstein, Lena Cohen (*alias* Smith), Ida Smith, May Smith, Annie Brown, Becky Schwartz, Martha Sharp, Annie Smith, R. Johnson, Lillie Smith and May Connor. That it was the official duty as aforesaid of the said Samuel J. Boyd, as captain of police as aforesaid, in command of said Fourth Police District as aforesaid, and as such public officer and state officer as aforesaid, to arrest and cause to be arrested Fannie Adams, Rose Brown, Birdie Hill (*alias* Hall), Becky Weinstein, Lena Cohen (*alias* Smith), Ida Smith, May Smith, Annie Brown Becky Schwartz, Martha Sharp, Annie Smith, R Johnson, Lillie Smith and May Connor for violation of the law, and for crime, in so setting up, keeping and maintaining said common bawdyhouses and brothels as aforesaid in said city of St. Louis, that they might be dealt with according to law, and to prevent said violation of law and crime, and to prevent and remove such common bawdyhouses and brothels as common nuisances, and to arrest and cause to be arrested said common prostitutes, bawds and disorderly persons as vagrants. That nevertheless the said Samuel J. Boyd, being captain of police as aforesaid, and commanding said Fourth Police District as aforesaid, and being such public officer and state officer as aforesaid, and then and there (and for a long time prior thereto) well knowing the premises aforesaid, did then and there, unlawfully and willfully, wholly neglect and omit to perform his said official duty as aforesaid, and then and there continuously did unlawfully and willfully wholly neglect and omit to use and exercise and to cause to be used and exercised all proper, reasonable and effective means within his power and authority as such captain of police, and as such public officer and state officer, for the prevention of the setting up, keeping and maintaining of the said common bawdyhouses and brothels, and each of them, and for the detention and arrest of the persons so setting up, keeping and maintaining the same. But on the contrary, he, the said Samuel J. Boyd, captain of police as aforesaid, and public officer and state officer as aforesaid, did then and there (and for a long time prior thereto) unlawfully and willfully suffer and permit the said common bawdyhouses and brothels to be openly and notoriously set up, kept and maintained at and in the buildings aforesaid, and the said unlawful and disorderly conduct and practices to be openly and notoriously committed therein as aforesaid, without any interference on the part of him, the said Samuel J. Boyd, captain of police as aforesaid, and public officer and state officer as aforesaid, and without any proper, reasonable and effective endeavor on his part toward the suppression thereof, or toward the detection and arrest of the persons setting up, keeping and maintaining the same, and without any proper, reasonable or effective endeavor on his part for the enforcement of the laws of this state respect-

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ing common bawdyhouses and brothels, and for the preventing of the violation of the laws of this state in respect to the setting up and keeping of common bawdyhouses and brothels, and in respect to vagrants and disorderly persons, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state. W. Scott Hancock, Assistant Circuit Attorney." A demurrer to this indictment was sustained, and judgment rendered on he demurrer, from wnich judgment the state appealed.

The indictment alleges the existence of 15 eparate and apart houses of ill-fame, giving the treet and number of each house, in the police district of which the defendant, as captain of police, had jurisdiction, and alleges that it was his official duty to suppress these houses. The ndictment further alleges that each of these 15 houses was kept and presided over by a separate person, giving the name of each of the 15 proprieresses, and that it was the official duty of the defendant to arrest, or cause to be arrested, those persons, for violating the law against the keeping of the character of houses described. It also aleges that these houses "were and had been for a long time continuously, openly and notoriously et up, kept and maintained, * * * and that then and there, for a long time prior thereto, unawful and disorderly conduct and practices were committed in each and all of said houses, and divers common prostitutes and bawds, vagrants and disorderly persons resorted to and resided in said houses for the purpose of common prostitution and bawdry," and that it was the official duty of defendant, as police captain, to arrest these persons as vagrants. It is nowhere alleged in the indictment that the offenses, for the commission of which it is charged it was the duty of defendant to make arrests, were committed in the presence or view of defendant, but that their commission was open and notorious and well known to the defendant. At common law, a sheriff, constable or other police officer has no authority to make an arrest without warrant for a misdemeanor not committed in his presence or view, only in exceptional cases. The offenses charged in the indictment as having been committed do not come within the exception. State v. Holcomb, 86 Mo. 371; State v. Underwood, 75 Mo. 230; 1 Bishop on Criminal Procedure, § 638. The inquiry, therefore, as to whether or not a police officer of the city of St. Louis may arrest for a misdemeanor not committed in his presence or view, becomes pertinent. The general duties required of police boards and police officers in respect to the preservation of the peace, etc., are found in section 6212, Rev. St. 1889. This section provides. "They shall, at all times of the day and night, within the boundaries of said cities, as well on water as on land, preserve the public peace, prevent crime and arrest offenders," etc. It has been held under this section, or rather the one of which it is a substantial copy (section 5, Acts 1860; Laws 1860–1861, p. 448), that a police officer may, without warrant, arrest for a past misdemeanor, provided the officer making the arrest has reasonable grounds to suspect a misdemeanor has been committed (State v. Grant, 76 Mo. 236; State v. Hancock, 73 Mo. App. 19), and that members of the metropolitan police force are officers of the state, and as such are authorized to make arrests for violations of the laws of the state (State *ex rel.* v. Mason, 153 Mo. 23, 54 S. W. Rep. 524; State v. Evans, 161 Mo. 95). In the revision of 1899 they are declared to be both state and city officers. Rev. St. 1899, § 6232. Their duty, as defined by section 6212, *supra*, is "to preserve the public peace, prevent crime and arrest offenders." In the discharge of this duty, they may arrest without warrant for a past misdemeanor, or to prevent the commission of any crime, or for the purpose of preventing a threatened breach of the peace. It has been well said that, "where it is the duty of an officer to make an arrest, he is bound to make it." We conclude that the defendant not only had the power to make arrests for misdemeanors not committed in his presence or view, but that it was his duty to arrest when he knew of the commission of any crime within the city.

The indictment purports to charge three distinct omissions of official duty. First, the omission to take legal steps and and to use lawful power to prevent the setting up, keeping, and maintaining of bawdyhouses in the Fourth Police District; second, the omission to arrest the 14 keepers of bawdyhouses in said district; third, the omission to arrest the inmates and habitues of the 14 houses in said district, as vagrants. One of the grounds of demurrer is that the indictment is duplicitous and multifarious. Bishop, in his work on Criminal Procedure (volume 1, § 432), says that duplicity "consists in alleging for one single purpose or object two or more distinct grounds of complaint or defense, when one of them would be as effectual in law as both or all. Duplicity in an indictment is the joinder of two or more distinct offenses in one count." This definition of duplicity in an indictment is approvingly cited in State v. Fox, 148 Mo., *loc. cit.* 525, 50 S. W. Rep. 98. In State v. Healy, 50 Mo. App. 243, it was held that two distinct publications of the same criminal libel constituted an offense in itself, and an indictment that charged both publication in one count was bad for duplicity. In State v. Bridges, 24 Mo. 353, A and B were charged in the same count with betting on the result of an election, and C with becoming stakeholder. The indictment was held bad for duplicity. The setting up or keeping of a bawdyhouse is a misdemeanor punishable by a fine of not less than $200 nor exceeding $1,000. Rev. St. 1899, § 2197. On conviction of vagrancy, the statute (section 2228, Rev. St. 1899) declares the punishment shall be "by imprisonment in the county jail not less than twenty days, or by a fine not less twenty dollars, or by both such

fine and imprisonment." If the defendant was put upon trial under this indictment on the charge of failure to arrest the 14 keepers of the bawdyhouses named, and failure to arrest the inmates and habitues of said houses, 6 of the jurors might believe him guilty of an omission to arrest Fannie Adams, or any one or more of the 14 keepers of the houses named, while the other 6 might believe him not guilty of that omission of duty but believe him guilty of an omission to arrest as a vagrant some inmate or habitue of one or more of the 14 houses, and thus the 12 agreed on a verdict of guilty, when in reality only 6 agreed that the defendant was guilty of one and the same omission of duty charged in the indictment and the other 6 believed him not guilty of that omission, but guilty of some other omission of duty as charged in the indictment. People v. Williams (Cal.), 65 Pac. Rep. 323. If, therefore, the purpose of the indictment was to charge the omission of duty consisted in the failure to arrest the various offenders named and described in the indictment, it is bad for duplicity. But we do not think it was the intention of the pleader to charge the omission to arrest the offenders named, as the gravamen of the offense. The indictment is, as near as may be, a copy of the indictment in the case of People v. Herlihy (Sup.), 73 N. Y. Supp. 236, in which it was charged that there were 109 bawdyhouses in the precinct over which defendant had jurisdiction as captain of police. The street and number of each house were stated. The neglect of duty charged was that the defendant, as police officer, "did there continuously, unlawfully and willfully, wholly neglect and omit to enforce and prevent violations of the laws of this state in respect to the keeping and maintenance of such houses of ill fame and prostitution," etc.

It was contended that the indictment was bad for duplicity; that it charged in one count 109 distinct offenses. In respect to this contention the court said: "We are of the opinion that it does not. It is true that, if the defendant willfully and knowingly permitted one house of ill fame to be maintained within his precinct, he was guilty of the crime charged in this indictment; but the allegation that he permitted over one hundred of such houses to be maintained does not render him the less guilty, nor does it charge him with an additional offense. The crime is the same. The gravamen of the offense alleged is n e g l e c t of duty in failing to suppress or close such houses, and in this respect the charge is analogous to one of conspiracy, which consists in the unlawful and corrupt agreement of the parties to it to do an unlawful act, which agreement is entirely distinct from the unlawful act which the parties had in mind when they entered into the agreement or conspiracy. For this reason it has been held that parties who enter into a conspiracy are by that act guilty of but one offense, whether this agreement is to commit one or many crimes. State v. Kennedy, 63 Iowa, 200, 18 N. W. Rep. 885. Here the offense of which the defendant is charged, as already indicated, consists in his willful omission and neglect of duty to suppress and prevent the maintenance of houses of ill fame within his precinct at the time specified. This is the charge, and if he is guilty of it, then he is guilty of but one offense, and it matters not whether there be one house, or upwards of one hundred, as alleged." The duty of the defendant as police officer of the city of New York, was under section 315, of the Greater New York Charter (Laws) 1901, p. 136, ch, 466, to "carefully observe and inspect all * * * houses of ill fame or prostitution and houses where common prostitutes resort or abide, * * * and to repress and restrain all unlawful and disorderly conduct or practices therein," etc. This section of the charter was a statutory warrant directed to the police officer, and comprehended all the houses of the character named in it—not one singly, but all singly and collectively—and directed the officer to repress the evil, whenever or wherever it was found to exist, whether in one or in many houses. By placing this indictment in the case of People v. Herlihy (Sup.), 73 N. Y. Supp. 236, and the one in hand, side by side, we see that the pleader patterned after the New York indictment, and intended to charge and did charge the identical offense alleged in that indictment, which, to use the language of the court in the New York case, "consists in his willful omission and neglect of duty to suppress and prevent the maintenance of houses of ill fame within his precinct at the time specified." The gravamen of the offense charged against the defendant is that he willfully and unlawfully permitted houses of ill fame to be set up, kept, and maintained in his district at the time specified in the indictment. The allegations of omission of duty to arrest the offenders named and described are but amplifications of the principal fact charged, and the indictment is valid if there is any statute of this state, charter provision or ordinance of the city of St. Louis, which makes it the duty of police officers to prevent the setting up, k e e p i n g, and maintaining of bawdyhouses in said city. There is no state statute that makes it the special duty of the board of police. No provision of the kind is found in the city's charter, nor has the legislative department of the city passed any ordinance making it the special duty of the board of police to prevent the setting up, keeping and maintaining of bawdyhouses in the city limits. But the setting up or keeping of a bawdyhouse is a crim and it is the duty of the board of police to "prevent crime and arrest offenders." Hence it is the duty of the metropolitan police force to preven the setting up or keeping of houses of ill fame within the city limits. The only power, however, they may exercise in the performance of this duty, is to arrest the offenders, when they are known to them. Under this view of the law

we think it competent, under the allegations of the indictment, to show that houses of ill-fame were permitted by defendant, as captain of police, to be notoriously kept in his district, with his knowledge, and that he made no reasonable effort to repress them by arresting the keepers and taking them before the courts of justice to answer for their crimes. As we construe the indictment, it charges a single offense, to wit, the omission of defendant, as a police officer, to take any steps to suppress any one or all of the 13 bawdyhouses alleged to have been set up and maintained in his district. To extend the scope of the indictment so as to cover every omission of duty incidentally charged, as failure to arrest any one or all of the 13 keepers of the 13 houses or any of their inmates, would require the defendant on the same trial to defend against many separate and distinct offenses, all charged in one count of the same indictment.

Judgment reversed and cause remanded.

NOTE.—*May a Police Officer Arrest for a Misdemeanor Not Committed in His Presence.*—It is the general rule that an arrest for a misdemeanor cannot be legally made without a warrant if not committed in the presence of the officer making the arrest. People v. Haley, 48 Mich. 495; State v. Crocker (Del.), 1 Houst. Cr. Cas. 434; Winn v. Hobson, 54 N. Y. Sup. Ct. 330; State v. Lewis, 50 Ohio St. 179. Thus, a peace officer cannot arrest one without a warrant for an assault not committed in his presence on the mere statement of a person that an assault has been committed against him. Jamison v. Gaernett, 73 Ky. (10 Bush) 221; Commonwealth v. Carey, 66 Mass. 246. So, also, an officer cannot, without a warrant, arrest a passenger for refusal to pay fare, upon complaint of the conductor, where such refusal is not made in their presence. Krulevitz v. Railroad, 143 Mass. 228. To the same effect State v. Davidson, 44 Mo. App. 513; Webb v. State, 51 N. J. Law, 189; State v. Sims, 16 S. Car. 486.

When is an offense committed in presence of officer? The rule of law is that it must be within the hearing or sight of the officer or within a very short time previous to his arriving on the scene of the crime. State v. Williams, 36 S. Car. 493. Thus, an officer may arrest, without a warrant, for wife beating, if he arrives at the scene during the progress of the beating, or immediately thereafter, being attracted by the noise of the disturbance, or the outcry of the woman. Ramsey v. State, 92 Ga. 53, 17 S. E. Rep. 613; Dilger v. Commonwealth, 88 Ky. 550. So, also, a breach of the peace is in the presence of the officer if it is so near that he can hear what is said, and the sound made by what is done. State v. McAffee, 107 N. Car. 812, 12 S. E. Rep. 435. So, also, an offense committed at some distance from an officer, and within his sight, though in the night, is sufficiently within his presence to justify an arrest without a warrant. People v. Bartz, 53 Mich. 493. It has been held, however, that shouting in the streets of a village was not in the "presence" of an officer, so as to justify an arrest without a warrant, when the officer was 150 feet away, on another street, and did not see the offender, and had no direct knowledge that it was he who committed the offense. People v. Johnson, 86 Mich. 175, 48 N. W. Rep. 870, 24 Am. St. Rep. 116, 13 L. R. A. 163.

In the matter of delay, it has been held that an interval of one-half hour after a misdemeanor has been committed before making an arrest without a warrant, is not unreasonable. Butolf v. Blust, 41 How. Prac. (N. Y.) 481. So, also, where defendant had taken butter from an express office and carried it about 500 yards, when he was apprehended, it was held that the larceny might be considered as still continuing, so as to authorize defendant's arrest without a warrant. State v. Grant, 76 Mo. 236. It has been held, however, that an interval of five hours between the alleged offense and the arrest, during which time the officer was not engaged in anything connected with the arrest, deprives him of authority to arrest therefor without a warrant. Wahl v. Walton, 30 Minn. 506, 16 N. W. Rep. 397.

We shall now turn our attention more particularly to cases involving the identical offense involved in the principal case—the failure to suppress bawds and bawdyhouses. In examining the cases we were surprised to learn that the entire weight of authority seems to be against the decision of the court in the principal case. Thus, it has been held that a police officer cannot, without a warrant, arrest one as a common prostitute on the ground that she is a disorderly person, unless the offense was committed in his presence. People v. Pratt, 22 Hun (N. Y.), 300. So, also, the fact that a woman has the reputation of being a street walker, and that the officer knows of her reputation and believes her to be plying her vocation, does not justify his arresting her, without a warrant, while walking along the street doing nothing to indicate such a purpose. Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. Rep. 579, 7 L. R. A. 570. So, even further, it has been held that an officer has no right to arrest, without a warrant, a female whom he suspects to be a woman of ill-fame, between 10 and 11 o'clock at night, merely for addressing him as "cousin." People v. Bush, 1 Wheeler Cr. Cas. 137. On the other hand, however, it has been held that a policeman may, without a warrant, arrest a prostitute who in his presence solicits men from the street for immoral purposes, though such solicitation is from the window of her room. Harft v. McDonald, 1 City Ct. Rep. 181.

BOOK REVIEWS.

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The fourth volume of the Encyclopedia of Evidence is now before us for review. The volume comprises all subjects of the law of evidence between Damages and Dying Declarations. The important subjects discussed in this volume are "Death and Survivorship," covering about 20 pages; "Declarations" discussed in about 40 pages; "Demonstrative Evidence" covering about 32 pages; "Depositions," taking up over 270 pages; "Discovery," discussed in about 42 pages; "Divorce," covering over 100 pages; and "Dying Declarations," consuming nearly 109 pages.

This new volume shows the same care which is apparent in all the other volumes, and is justifying our belief that this work will prove of great value to the active practitioner. Published by L. D. Powell Company, Los Angeles, Cal.

HUMOR OF THE LAW.

Young Attorney—"And what is your business?"
Witness—"I am a conductor."
Young Attorney—"Railway, musical or lightning?"

Young Attorney—And now, as this glorious bird of freedom soars high in the empyrean—
Judge—Hold on, Mr. Counsellor, you are outside the jurisdiction of this court.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL — Validity of Service.—Want of legal service on a corporation in an action held not ground for abatement, where it is joined with a co-defendant properly suable in county where action was brought.—Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co., Ind., 72 N. E. Rep. 183.

2. ACCORD AND SATISFACTION — Maintenance of Children.—Settlement between husband and wife pending her suit for divorce held to constitute accord and satisfaction, barring her right to recover thereafter for maintenance of children.—Dixon v. Dixon, Mo., 82 S. W. Rep. 547.

3. ACTION—Separable Claims.—In an action involving separable claims, the right to try those on which a cause of action has accrued held not affected because the suit is prematurely brought as to the others.—Anthony v. Smithson, Kan., 78 Pac. Rep. 454.

4. ADVERSE POSSESSION—Of Private Land Under Mistaken Impression.—A person who takes possession of land, with intent to claim it under the federal homestead law, may acquire title by adverse possession.—Maas v. Burdetzke, Minn., 101 N. W. Rep. 182.

5. ADVERSE POSSESSION—Property Fenced in by Mistake.—Though a lot owner built his fence over the line on the land of another, he cannot claim by adverse possession, where he only claimed the land described in his deed.—Murdock v. Stillman, Ark., 82 S. W. Rep. 834.

8. APPEAL AND ERROR—Assignments of Error.—It is not necessary for the appellant to assign his reasons in the specifications of error contained in his brief.—State v. Justice Court of Tp. No. 1, Gallatin County, Mont., 78 Pac. Rep. 498.

9. APPEAL AND ERROR — Creditor's Suit.—Where both the parties and the trial judge considered a demurrer as filed to a petition as amended, it would be so considered on appeal, though there was no order disposing of the amendment.—Williston Seminary v. Easthampton Spinning Co., Mass., 72 N. E. Rep. 67.

10. APPEAL AND ERROR — Motion for Judgment on Pleadings.—A motion for judgment on the pleadings is not made a part of the record merely by being copied by the clerk into the transcript.—Grubbs v. Needles, Ind. Ter., 82 S. W. Rep. 873.

11. APPEAL AND ERROR — Pleading. — Where, when a demurrer was sustained to a special paragraph of an answer, it also contained a general denial, defendant could not convert the ruling on the demurrer into error by withdrawing the general denial.—Beasey v. High, Ind., 72 N. E. Rep. 181.

12. APPEAL AND ERROR — Record on Appeal.—An amended response, which the court refused to allow to be filed, held not to be considered on appeal, not being verified or made part of the record. — Polsgrove v. Walker, Ky., 82 S. W. Rep. 979.

13. APPEAL AND ERROR — Right to Complain of Order Not Enforced.—A party could not complain of an order for the production of his books, which was never complied with or enforced.—Southern Car & Foundry Co. v. Calhoun County, Ala., 37 So. Rep. 425.

14. ASSAULT AND BATTERY — Deadly Weapons —The holding of a loaded pistol within a few inches of another person's face, accompanied by threatening language, warrants a conviction for an assault with a deadly weapon.—People v. Wells, Cal., 78 Pac. Rep. 470.

15. ASSIGNMENT—Building Contracts.—It was not essential to the validity of an equitable assignment of a part of a fund due a building contractor to his surety that notice of such assignment be given to the debtor.—Campbell v. J. E. Grant Co., Tex., 82 S. W. Rep. 794.

16. ATTORNEY AND CLIENT—Disbarment.—A judgment disbarring an attorney, unsupported by any evidence except the accusation against him, sworn to on information and belief, will be set aside.—*In re* Lurnette, Kan., 78 Pac. Rep. 440.

17. ATTORNEY AND CLIENT — Negligence in Examining Title.—An attorney employed to examine a title, who fails to find existing liens on the premises, is liable on his bond of employment.—Humboldt Bldg. Assn. Co. v. Ducker's Exr., Ky., 82 S. W. Rep. 969.

18. ATTORNEY AND CLIENT—Submission of Cause.—In a suit to foreclose certain mortgages, defendant, being represented by her husband, who was an attorney, held bound by his submission of the cause under an agreement for settlement without defense.—Wilkie v. Reynolds, Ind., 72 N. E. Rep. 179.

19. BANKRUPTCY — Adverse Claim.—A third person, who took property from the possession of a bankrupt on a writ of replevin from a state court after the filing of the petition in bankruptcy and the appointment of a receiver thereon, may be cited before the referee and his rights determined in a summary proceeding.—*In re* Briskman, U. S. D. C., W. D. N. Y., 132 Fed. Rep. 201.

20. BANKRUPTCY — Ancillary Jurisdiction. — Where a federal district court in a district other than that where a corporation was adjudged a bankrupt extended a receivership over property in its district and granted other orders, it had ancillary jurisdiction to grant an application for the examination of witnesses under Bankr., Act July 1, 1898.—*In re* Sutter Bros., U. S. D. C., S. D. N. Y., 130 Fed. Rep. 654.

21. BANKRUPTCY — Fraudulent Conveyances.—A trustee in bankruptcy cannot complain of the fraudulent character of a mortgage given by a purchaser from the bankrupt to a third party, unless he can impeach the sale from the bankrupt to the purchaser on other grounds.—Sellers v. Haves, Ind., 72 N. E. Rep. 119.

22. BANKRUPTCY—Provable Debts.—Only debts created by fraud of a bankrupt while he was acting as an officer or in a fiduciary capacity are excepted from the operation of a discharge in bankruptcy by Act July 1, 1898, ch. 541, § 17, subd. 4, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428).—Crawford v. Burke, U. S. S. C., 25 Sup. Ct. Rep. 9.

23. BANKRUPTCY—Rights of Trustee.—A trustee in bankruptcy takes property of the bankrupt subject to all liens, legal or equitable, and can enforce no greater rights than are held by the bankrupt and creditors he represents.—Eason v. Garrison & Kelly, Tex., 82 S. W. Rep. 800.

24. BANKRUPTCY—Testimony, Admissibility in Subsequent Proceedings.—The testimony of a third person, taken generally, not directed to any defined issue, is not admissible in subsequent proceedings to compel the bankrupt to surrender property or money of the estate alleged to be in his possession.—*In re* Alphin & Lak Cotton Co., U. S. D. C., E. D. Ark., 131 Fed. Rep. 82

25. BANKS AND BANKING — Checks, Payment. — The drawer of a check payable to a bank cashier and deposited by another for collection held not bound by a custom of the bank to pay the proceeds of such checks to the depositor.— Kuder v. Greene, Ark., 82 S. W. Rep. 836.

26 BANKS AND BANKING—Deposit on Money by Gambler. -A bank may legitimately receive on deposit the moneys of a gambler, with reason to believe that it was won in gaming; but when, with knowledge that such depositor is obtaining the money by fraud, it acts in aid of the wrongful means by which the money is obtained, it is liable therefor. — Wright v. Stewart, U. S. C. C., D. Mo., 130 Fed. Rep. 905.

27. BENEFIT SOCIETIES — Suicide and Incontestable Clauses.—Suicide and incontestable clauses in insurance policy held independent, and neither to affect the terms of the other.—Childress v. Fraternal Union of America, Tenn., 82 S. W Rep. 832.

28. BILLS AND NOTES — Entry of Payment on Back of Note.—The correctness of an entry on the back of a note will be inferred from the fact that the indulgence therein provided for was actually given.—Cook v. Landrum, Ky., 82 S. W. Rep. 585.

29. BREACH OF THE PEACE—Evidence, Variance.—It is not necessary, to sustain a prosecution for disturbing the peace, that any person should testify that he was disturbed by defendant's conduct. — Stancliff v. United States, Ind. Ter., 82 S W. Rep. 882.

30. BREACH OF THE PEACE—Vile Epithets. — One who applies vile epithets to another in a public street, in the presence of bystanders, commits a breach of the peace.— State v. Appleton, Kan., 78 Pac. Rep. 445.

31. BRIDGES—Notice of Defects.—A general knowledge of the plan of a bridge, faulty in some respects, which had been used for about nine years, cannot be regarded as notice of a decayed sill.—Parr v. Board of Comrs. of Shawnee County, Kan., 78 Pac. Rep. 449.

32. BUILDING AND LOAN ASSOCIATIONS—Contract as to Maturity of Stock.—A mutual building association has no power to contract that stock will mature in a definite time.—People's Building & Loan Assn. v Purdy, Colo., 78 Pac. Rep. 465.

33. CARRIERS—Discriminaton.—A common carrier is required to provide facilities for goods tendered at its stations on payment of the tariff rates.-State v. Chicago, B. & Q. R. Co., Neb , 101 N. W. Rep. 23.

34. CARRIERS—Crossing Other Roads.—The place and character of the crossing of one railroad track over another railroad track are determined by the situation of the parties. the public interest and the expense.— Wellsburg & S. L. R. Co. v. Panhandle Traction Co., W. Va., 48 S. E. Rep. 746.

35. CARRIERS—Limiting Liability.—A contract to ship goods "released" means that the carrier is relieved only from losses occasioned without his negligence.— Georgia, Southern & F. Ry. Co. v. Johnson, King & Co., Ga., 48 S. E. Rep 807.

36. CHATTEL MORTGAGES—Replevin of Cattle.—In replevin of cattle by plaintiff under a mortgage, an instruction was proper which required the jury to find whether the cattle sued for were those described in the mortgage.—National Bank of Boyertown v. Schufelt, Ind. Ter., 82 S. W. Rep. 927.

37. CLERKS OF COURTS—Fees, When Printed Copies are Furnished.—The clerk of the circuit court cannot be deprived of the costs taxed for copies of records and papers by reason of the fact that the parties make and furnish a printed copy to him. — State v. Board of Police Comrs., Mo., 82 S. W. Rep. 960.

38. CONSPIRACY—Legislation Affecting Malicious Injury.—Rights under Const. U. S. Amend. 14, held not infringed by Rev. St. Wis. 1898, § 4466a, punishing combinations for the purpose of willfully injuring another in his busines, as applied to a combination of newspaper managers.—Aikens v. State of Wisconsin, U. S. S. C., 25 Sup. Ct. Rep. 3.

39. CONSTITUTIONAL LAW—Bankruptcy.—Acts 1901, p 505, ch. 118 (Burns' Ann. St. 1901, § 6637a *et seq.*), relative to sales in bulk, is, if construed to give wholesalers a right to subject the retailer's whole stock to liability to satisfy an indebtedness to them, repugnant to Const. U. S. Amend. 14.—Sellers v. Hayes, Ind., 72 N. E. Rep. 119.

40. CONSTITUTIONAL LAW—Insane Persons, Imprisonment.—Pub. Laws 1899, p. 26, ch. 1, § 67, relating to discharge of insane, held unconstitutional, because interfering with the power of the court to inquire into the legality of imprisonment.—*In re* Boyett, N. Car., 48 S. E. Rep. 789.

41. CONSTITUTIONAL LAW—Vaccination, School Children.—Laws 1900, p. 1484, excluding children not vaccinated from public schools, held not a violation of Const. art. 9, § 1, providing for a system of free common schools.—Viemeister v. White, N. Y., 72 N. E. Rep. 97.

42. CONTEMPT—Power of Court.—Where the conduct of an attorney is disorderly, and his demeanor toward the court insulting, the court has power to, and should of its own motion, note and punish the guilty person summarily for contempt.—Mahoney v. State, Ind., 72 N. E. Rep. 151.

43. CONTRACTS—Equity to Compel Performance.—The mere nonperformance of a beneficial parol agreement is not such fraud as will induce equity to compel performance, but there must be some element of fraud or bad faith.—Avery v. Stewart, N. Car. 48 S. E. Rep. 775.

44. CONTRACTS—Impossibility of Performance.—One who signed on April 28th a contract to convey land on April 23d of the same year is not bound because of the impossibility of performance of such contract.—Le Roy v. Jacobosky, N. Car., 48 S. E. Rep. 796.

45. CONTRACTS—Validity.—In order to constitute a binding contract, the terms of payment, as well as the other elements of the contract, must be agreed upon.— Brophy v. Idaho Produce & Provision Co., Mont., 78 Pac. Rep. 493.

46. COURTS—Diversity of Citizenship.—The jurisdiction of a federal circuit court over a controversy between citizens of different states, claiming under grants from different states, held to depend entirely on diversity of citizenship, within rule making decrees of circuit court of appeals final in such cases.—Stevenson v. Fain, U. S. S. C., 25 Sup. Ct. Rep. 6.

47. CRIMINAL LAW—Gaming.—Under a statute providing for imprisonment for not less than 10 nor more than 90 days for violation thereof, an instruction authorizing the assessment of punishment at not less than 10 nor more than 30 days was harmless to a defendant who received the minimum punishment.—Mayo v. State, Tex., 82 S. W. Rep. 515.

48. CRIMINAL TRIAL—Burden of Proving Insanity.— While the burden of proving insanity as a defense rests on the defendant, a preponderance of the evidence is all that is required.—People v. Wells, Cal., 78 Pac. Rep. 470.

49. CRIMINAL TRIAL—Failure to Swear Jury.—A new trial will not be granted because the jury was not properly sworn on a prosecution for disturbing the peace, where defendant knew of the fact before verdict. —Stancliff v. United States, Ind. Ter., 82 S. W. Rep. 882.

50. CRIMINAL TRIAL—Opinion Evidence.—On a trial for murder, held error for a physician to state his opinion as to the position of deceased's arm when he was shot.—Wilson v. United States, Ind. Ter., 82 S. W. Rep. 924.

51. CRIMINAL TRIAL—Perjury.—In a prosecution for perjury before a justice, the latter may give oral testimony as to contents of lost documents relating to his title to office and to his public discharge of his duties.— State v. Horine, Kan., 78 Pac. Rep. 411.

52. CRIMINAL TRIAL—Rape, Several Acts of Intercourse.—Where, in a prosecution for rape, several acts of intercouse were proved, it was error to refuse to require the state to elect on which act it would rely.— Powell v. State, Tex., 82 S. W. Rep. 516.

53. CURTESY—"Heirs" or "Descendants."—The words "heirs" and "descendants," used in the creation of a separate estate for a married woman, will not alone at her death exclude the marital rights of the husband.—Wood v. Reamer, Ky., 82 S. W. Rep. 572.

54. DAMAGES—Arrest by Carrier's Agent.—In an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the company, evidence showing the bad character of the passenger held inadmissible.—Texas Midland R. R. v. Dean, Tex., 82 S. W. Rep. 524.

55. DAMAGES—Failure to Except to Amount Awarded.—Where plaintiff was entitled to greater damages than she was awarded, but she failed to except to the ruling, the judgment will be affirmed.—Chicago & S. E. Ry. Co. v. Potts, Ind., 72 N. E. Rep. 168.

56. DAMAGES—Physical Condition.—In an action for injuries, an instruction permitting the jury, in estimating plaintiff's damages, to consider her present physical condition, as shown by the evidence, held error.—Chicago Union Traction Co. v. Miller, Ill., 72 N. E. Rep. 25.

57. DAMAGES—Prospective Suffering.—In an action for personal injuries, plaintiff may recover damages for prospective suffering.—Newport, L. & A. Turnpike Co. v. Pirmann, Ky., 82 S. W. Rep. 976.

58. DEDICATION—Sale of Land by Plat.—Equity will compel landowner, selling lots according to plat, to open streets and alleys thereon for the benefit of the lot owners.—Edwards v. Moundsville Land Co., W. Va., 48 S. E. Rep. 754.

59. DEEDS—Consideration.—Where a deed provides that the grantee shall assume and pay existing mortgages, liens, taxes, and claims of any and every description, the presumption is that such payments were a part of the consideration for the conveyance.—Gage v. Cameron, Ill., 72 . E. Rep. 204.

60. DEEDS—Failure to Record, Subsequent Purchasers.—The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice.—Sheldon v. Powell, Mont., 78 Pac. Rep. 491.

61. DOWER—Equitable Estate.—Where the purchase money has been paid in full and the purchaser put in possession, he has an equitable interest, which his widow is entitled to have valued in allotting her dower.—Howell v. Parker, N. Car., 48 S. E. Rep. 762

62. EASEMENTS—Reservation in Deed, Private Alley.—Under a reservation in a deed, the owner of certain inside lots in the business district of a city held entitled to the maintenance of a private alleyway 18 feet wide across certain corner lots, for travel, light and air.—Barber v. Allen, Ill., 72 N. E. Rep. 33.

63. EJECTMENT—Tender for Improvements.—In ejectment, where there is a prayer for damages for the wrongful detention of the premises, a tender of money for improvements need not be brought into court.—Price v. Cherokee Nation, Ind. Ter., 82 S. W. Rep. 893.

64. ELECTIONS—Ballots, Political Device.—The penalty of losing his ballot will not, in the absence of a statute, be imposed on a voter because of informalities in his ballot, due to a violation of the law by the persons who constructed the ballot.—Esquibel v. Chaves, N. Mex., 78 Pac. Rep. 505.

65. ELECTION OF REMEDIES—Wrongful Discharge.—Where a servant, wrongfully discharged, recovered for three days of service before the same was due under his contract, he could not thereafter recover under the contract.—James v. Parsons, Rich & Co., Kan., 78 Pac. Rep. 438.

66. EMINENT DOMAIN—Intervention.—All persons, whose claims were within clause of deed assuming to pay existing mortgages, liens, taxes, and claims of any and every description, held entitled to intervene in suit in equity by the grantor to enforce such payments.—Gage v. Cameron, Ill., 72 N. E. Rep. 204.

67. EMINENT DOMAIN—Railroad Bridges.—Requiring railroad company to enlarge its bridge over natural water course held not to invade any constitutional provision against taking property without just compensation.—Chicago, B. & Q. R. Co. v. People, Ill., 72 N. E. Rep. 219.

68. EQUITY—Laches.—To bar a remedy because of laches there must appear some circumstances from which prejudice may result from the delay if the remedy is allowed.—Cahill v. Superior Court of City and County of San Francisco, Cal., 78 Pac. Rep. 467.

69. EQUITY—Pleading.—Where an equitable demand is united with a legal demand in a bill seeking and enforcement of the former, the allegations as to the legal demand may be ignored.—Wellsburg & S. L. R. Co. v. Panhandle Traction Co., W. Va., 48 S. E. Rep. 746.

70. ESTOPPEL—Vendor and Purchaser.—Purchasers of land held to be in no position to resist an action for balance due on price because of an overplus of land, on the ground that the deed was conclusive as to the price—See v. Mallonee, Mo., 82 S. W. Rep. 557.

71. EVIDENCE—Contradicting Map Previously Introduced.—A party cannot introduce parol testmony contradicting a map previously introduced by him.—Schneider v. Sulzer, Ill., 72 N. E. Rep. 19.

72. EVIDENCE—Creation of Trust.—If a deed merely conveys a fee simple title, parol evidence is admisible to show a holding in trust.—Mee v. Mee, Tenn., 82 S. W. Rep. 880.

73. EVIDENCE—Declaration as to Boundaries.—The marking of a tree or placing of a stone, at the time o surveying a junion grant, to mark the end of a call for the line of the senior grant, held, in general, incompetent on the issue of the true location of the senior grant.—Hill v. Dalton, N. Car., 48 S. E. Rep. 784.

74. EVIDENCE—Expert Testimony as to Stopping Car.—The distance within which a street car in motion may be stopped by the use of a brake is a question on which an expert witness may properly give an opinion.—Indianapolis St. Ry. Co. v. Seerley, Ind., 72 N. E. Rep. 169.

75 EVIDENCE—Vaccination.—Courts will take judicial notice that it is common belief that vaccination will prevent smallpox.—Viemeister v. White, N. Y., 72 N. E. Rep. 97.

76. EXECUTORS AND ADMINISTRATORS—Claims, Services of Wife.—A wife held not entitled to recover from the estate of her father-in-law for ordinary domestic services rendered him in the household of her husband.—Durr v. Durr, Ky., 82 S. W. Rep. 581.

77. EXECUTORS AND ADMINISTRATORS—Payment of Taxes.—It is the duty of an executor or administrator to take notice of taxes due from his estate and pay the same.—Cullop v. City of Vincennes, Ind., 72 N. E. Rep. 166.

78. EXECUTORS AND ADMINISTRATORS—Setting Aside Fraudulent Conveyance.—The heirs of one making a frandulent conveyance held to have no right as heirs to have the conveyance set aside.—Neal v. Neal, Ky., 82 S. W. Rep. 981.

79. FIRE INSURANCE—Mortgage Clause.—Where a fire policy was issued, payable to a mortgagee as his interest might appear, any defense available against the insured was available against the mortgagee.—Hamburg-Bremen Fire Ins. Co. v. Ruddel, Tex., 82 S. W. Rep 826.

80. FIXTURES—Cotton Press.—A cotton press held not to pass with a sale of the land on which it stood.—Tenniswood v. Smith, Ark., 82 S. W. Rep. 884.

81. FRAUDS—Conveyance of Land, Consideration.—Where plaintiff conveyed land to his son in consideration of support, his subsequent agreement with the son that the consideration should be furnished by defendant and the land conveyed to her was not within the statute of frauds.—Brumback v. Chowning, Ky., 82 S. W Rep. 974.

82. FRAUDS, STATUTE OF—Failure to Plead Statute.—That no memorandum in writing was made when the lands were sold is immaterial in partition proceedings

as to such lands, where the vendor has not pleaded the statute of frauds and has made the conveyance. — Howell v. Parker, N. Car., 48 S. E. Rep. 762.

83. FRAUDULENT CONVEYANCES — Bankruptcy. — The fact that a seller is known by the buyer to be deeply indebted or insolvent is not of itself enough to charge the buyer with a want of good faith in making the purchase. —Sellers v. Hayes, Ind., 72 N. E. Rep. 119.

84. FRAUDULENT CONVEYANCES — Grantee in Good Faith.—In an action for the possession of land by one claiming under an execution sale, held, that the judgment gave him all that he was equitably entitled to.—Williamson v. Blackburn, Ky., 82 S. W. Rep. 600.

85. FRAUDULENT CONVEYANCE — In Pari Delicto. — Plaintiff and defendants, who were parties to a fraudulent conveyance, held not *in pari delicto* and hence defendants were entitled to have the conveyance vacated.—Hutchinson v. Park, Ark., 82 S. W. Rep. 848.

86. GUARDIAN AND WARD—Liability of Sureties.—Sureties of a guardian held liable for her acts after her appeal with *supersedeas* from an order of removal.—Clay v. Cunningham, Ky., 82 S. W. Rep. 973.

87. GUARDIAN AND WARD — Unauthorized Contract to Sell Ward's Land.—A contract by a guardian to sell his ward's real estate, without having obtained any authority from the court to enter into such contract, is contrary to public policy and void.—Le Roy v. Jacobosky N. Car., 48 S. E. Rep. 796.

88. HOMESTEAD—Relinquishment, Dower and Homestead Rights.—It is competent for a husband and wife by agreement to bar the dower of the wife and relinquish the interest of the wife in the homestead estate, where there are no minor children interested.—Merki v. Merki, Ill., 72 N. E. Rep. 9.

89. HOMICIDE—Deadly Weapons. — The law presumes that a loaded gun is a deadly weapon.—Territory v. Watson, N. Mex., 78 Pac. Rep. 504.

90. HOMICIDE—Killing Officer While Making Arrest.—Where a police officer was killed while arresting for an offense committed in his presence, no question of the right to make an arrest without a warrant arose.—State v. Appleton, Kan., 78 Pac. Rep. 445.

91. HOMICIDE — Conspirators.—In a prosecution for murder resulting from a conspiracy, a charge that one conspiring to commit an offense would be guilty as a principal, whether present or not, held erroneous.—Bowen v. State, Tex., 82 S. W. Rep. 520.

92. INDIANS — Authority to Forfeit Improvements of Non-Citizens.—The Choctaw Nation held to have no authority, unless given it by treaty or congress, to forfeit improvements of non-citizens.—Ansley v. McLoud, Ind. Ter., 82 S. W. Rep. 908.

93. INDIANS—Merchants' Licenses.—The power to enforce the terms of a treaty with the Choctaw and Chickasaw Indians, that no person shall expose goods for sale without a permit, is a duty imposed on the executive department of the government, and in the discharge of that duty it is not within the jurisdiction of the courts to enjoin such action.—Zevely v. Weimer, Ind. Ter., 82 S. W. Rep. 941.

94. INDIANS—Right to Transfer Lands to United States Citizen.—A Creek citizen, entitled to possession of Indian lands, has no authority to sell to a United States citizen the right to any of such tribal lands.—Denton v. Capital Townsite Co., Ind. Ter., 82 S. W. Rep. 852.

95. INFANTS — Default Judgment Against. — A default judgment, rendered on a contract against an infant who has been personally served, is voidable only.—Cook v. Edson Keith & Co., Ind. Ter., 82 S. W. Rep. 918.

96. INJUNCTION—Municipal Interference with Property Rights.—Equity will enjoin criminal proceedings under void municipal ordinance, where property rights will otherwise be destroyed.—Dobbins v. City of Los Angeles, U. S. S. C., 25 Sup. Ct. Rep. 22.

97. INSANE PERSONS—Habeas Corpus.—A person confined in the hospital for the insane, pursuant to the unconstitutional provisions of Pub. Laws 1899, pp. 25, 26, ch. 1, §§ 65, 67, held not entitled to be released on *habeas corpus* if he is at the time actually insane, pending proceedings under section 15, p. 6.—*In re* Boyett, N. Car., 48 S. E. Rep. 799.

98. INTERNAL REVENUE—Oleomargarine. — Oleomargarine, containing vegetable oil producing a yellow shade resembling butter, held not within proviso ch. 840, § 8, 24 Stat. 209, imposing a lesser tax on oleomargarine when free from artificial coloration causing it to look like butter.—Cliff v. United States, U. S. S. C., 25 Sup. Ct. Rep. 1.

99 INTOXICATING LIQUORS—Permitting Minors in Saloon.—That a liquor dealer believed that a minor, entering and remaining in his saloon, was of age, is no defense to an action on his bond.—Gilbreath v. State, Tex., 82 S. W. Rep. 807.

100. JUDGMENT—Motion to Correct.—A motion to correct a judgment by a *nunc pro tunc* entry need not be filed before the notice of the motion is served on the adverse party.—Indianapolis & G. Rapid Transit Co. v. Andis, Ind., 72 N. E. Rep. 145.

101. JUDGMENT—Vacation.—That a judgment sought to be vacated for fraud had been classified by the county judge as a valid claim against the estate of the debtor did not deprive the court of jurisdiction of the suit to vacate.—Eatwell v. Roessler, Tex., 82 S. W. Rep. 796.

102. LANDLORD AND TENANT—Concealment of Defects in Building.—Lessor held liable for concealment of defects in building whereby lessee is compelled to remove goods therefrom.—Steefel v. Rothschild, N. Y., 72 N. E. Rep. 112.

103. LANDLORD AND TENANT—Where Part of Premises are let for Illegal Purposes.—Where a landlord has rented part of his building as a dwelling, and permits another part to be used for illegal purposes, and the tenant moves away, it constitutes an eviction in answer to claim for rent accruing after such removal.—Weiler v. Pancoast, N. J., 58 Atl. Rep. 1084.

104. LIENS—Bona Fide Purchasers.—A purchaser of shingles, paying by giving credit on a prior debt, held not a *bona fide* purchaser, so as to take them free from lien for labor.—Bard v. Meiser, Ark., 82 S. W. Rep. 836.

105. LIFE INSURANCE—Surrender for Cancellation.—In the absence of any reservation of such right, the assured in a life policy cannot surrender the policy for cancellation.—Mutual Life Ins. Co. v. Allen, Ill., 72 N. E. Rep. 200.

106. LIFE INSURANCE—Vested Interest of Beneficiary. —Where a mutual insurance policy has gone into full force, the beneficiary has an interest therein which cannot be devested by insured without her consent.—Penn. Mut. Life Ins. Co. v. Norcross, Ind., 72 N. E. Rep. 132.

107. MANDAMUS — Town Board of Auditors. — Mandamus will not lie to compel town board of auditors to review and allow a claim against the town.—People v. Matthies, N. Y., 72 N. E. Rep. 103.

108. MARSHALING ASSETS AND SECURITIES—Right to Maintain Proceedings.—The burden is on one seeking to marshal assets to show that he will be benefited and that the senior lienors will not be materially prejudiced.—Gibson v. Honnett, Ark., 82 S. W. Rep. 838.

109. WITNESSES — Effect of Improper Evidence. — Where a witness was interrogated as to certain alleged statements, evidence in contradiction of such statements was admissible.— Wilson v. United States, Ind. Ter., 82 S. W. Rep. 924.

110. WITNESSES—Impeaching Witness.—A party had no right to cross-examine a witness as to his relations with his wife and as to whether he supported his family —Chicago City Ry. Co. v. Uhter, Ill., 72 N. E. Rep. 195.

111. WITNESSES—Proper Questions on Cross-Examination.—Where a witness testified that he was manager for a co-operative building company, it was not error to refuse to allow the adverse party to ask him what were the purpose and object of the company.—Mutual Life Ins. Co. v. Allen, Ill., 72 N. E. Rep. 200.